Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term 2005

MICHAEL BRAD MAGLEBY,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of conspiracy to violate civil rights and sentenced to 144 months, including a ten year enhancement for the "use" of fire under 18 U.S.C. § 844(h)(1), after he and a minor had engaged in a highly-publicized cross burning. Trial counsel objected at length to jury instructions that violated the First Amendment based on decisions of this Court and the Eighth Circuit, and argued for greater than thirty transcript pages that one cannot "use" fire to commit a conspiracy based on the common sense argument in *United States v. Hayward*, which presaged the Seventh Circuit's decision in *United States v. Colvin*. The trial judge himself recommended that the Government drop the enhancement charges. New counsel on appeal failed to present these well-preserved and obvious arguments, but instead unsuccessfully briefed ten issues involving (1) unobjected to jury instructions, (2) sufficiency arguments, and (3) evidentiary arguments.

1. Whether the *Strickland* and/or "dead-bang winner" standard applies to ineffective assistance of appellate counsel claims under 18 U.S.C. § 2255; if so, does this case satisfy that standard when appellate counsel failed to argue obvious, well-preserved issues likely to result in reversal in favor of weaker and unpreserved issues?

2. Whether Petitioner's convictions based solely on the message of a burning cross comply with the First Amendment where the judge refused to instruct the jury that it must find a true threat of imminent violence to convict, contrary to the "seminal" case of *United States v. Lee*, 6 F.3d 1297 (8th Cir., 1993) (*en banc*), and this Court's decisions on what constitutes a "true threat" of violence?

3. Whether a conspiracy to burn a cross under 18 U.S.C. § 241 is a predicate felony under 18 U.S.C. § 844(h)(1) where § 241 only makes criminal the agreement of the conspiracy itself and thus, as was found in *United States v. Colvin*, 653 F.3d 569 (7th Cir., 2003) (*en banc*), one does not "use" fire to conspire under § 241 to burn a cross?

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Other Authorities

Jennifer Golm, "Criminal Procedure: *Walker v. State* [933 P. 2d 327 (Okla. Crim. App. 1997)] – Dooming Challenges to Appellate Counsel's Effectiveness," 51 Okla. L. Rev. 601 Fall 1998 14

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G. Fred Metos, "Appellate Advocacy: Selecting Issues to Argue on Appeal," 23 Champion 67, Sept./Oct. 1999 18

Petitioner Michael Brad Magleby respectfully petitions for a Writ of Certiorari to review the judgment below because the United States Court of Appeals for the Tenth Circuit has decided important questions in a way that conflicts with decisions of this Honorable Court, the United States Court of Appeals for the Seventh Circuit, and the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

Review is sought of *United States of America v. Michael Brad Magleby*, 420 F.3d 1136 (10th Cir., 2005), *rehearing en banc* denied Sept. 20, 2005. This reported opinion affirmed the decision of the district court to deny Magleby's motion under 28 U.S.C. § 2255, and is reproduced as Appendix A, along with the order of the Tenth Circuit denying Magleby's petition for rehearing.

The unreported decision of the United States District Court for the District of Utah to deny Magleby's motion under 28 U.S.C. § 2255 is reproduced as Appendix B.

The prior reported decision of the Court of Appeals that affirmed Magleby's conviction on direct appeal is *United States v. Michael Brad Magleby*, 241 F.32 1306 (10th Cir., 2001), and is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its decision on August 19, 2005. On September 20, 2005, the Court of Appeals entered an order denying Magleby's petition for rehearing. This Honorable Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED IN THE CASE

Constitution of the United States

Amendment 1 – Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble, and to petition the Government for redress of grievances.

Amendment 5 - Criminal Actions-Provisions Concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6 - Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes

18 U.S.C. § 241. Conspiracy Against Rights

If two or more persons conspire to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory, or District in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured-

They shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravates sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of years or for life, or both, or may be sentenced to death.

18 U.S.C. § 844. Penalties

(h) Whoever -

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 5 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 10 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

42 U.S.C. § 3631. Violations; penalties

Whoever, whether or not under color of law, by force or threat of force willfully injures, intimidates or